Supreme Court, U. S.
FILED
OCT 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-347

ORECK CORPORATION, *Petitioner,*

v.

WHIRLPOOL CORPORATION,

and

SEARS, ROEBUCK & COMPANY, *Respondents.*

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Respondents, in a transparent effort to obscure the important issues raised by the Petition, attempt to portray this as a routine "exclusive distributorship" case (Br. in Opp. 9, 10). Like the majority below, they rely almost entirely on exclusive dealership and dealer substitution cases (*id.*); and they egregiously misstate the principal question here presented as being: "Absent price-fixing, whether it is a *per se* violation of the Sherman Act for a single retailer to request of and receive

from a single manufacturer an agreement to sell to it exclusively" (Br. in Opp. 1).

But, of course, this is not an exclusive dealership case. There was neither claim nor evidence at trial that Sears had ever requested or received an exclusive distributorship for Whirlpool-manufactured vacuum cleaners. The position now taken by respondents is not only without record support but is totally at war with their position at trial that Whirlpool had acted unilaterally, without any involvement by or agreement with Sears. See Petition p. 17.[1] The jury rejected respondents' unilateral conduct defense.

Respondents, however, cannot entirely avoid recognizing the real issue. Thus, they acknowledge that "Whirlpool discontinued selling to Oreck in 1977 . . . allegedly at Sears insistence" and that the "fundamental difference between the majority and the dissent below . . . was whether that conduct, if true, was a *per se* violation of Section 1 of the Sherman Act" (Br. in Opp. 2). The jury found a Whirlpool-Sears agreement

[1] Even in the Brief in Opposition, respondents are unwilling to concede there was *any* agreement between Sears and Whirlpool. They refer to "their agreement, *assuming it existed*" (Br. in Opp. 6, emphasis added); they argue that respondents had agreed "*assuming they agreed at all* to what is at most an exclusive distributorship" (Br. in Opp. 9, emphasis added); and they speak of the "alleged agreement between Whirlpool and Sears *even if it existed as a matter of undisputable fact . . .*" (Br. in Opp. 11, n.6, emphasis added). Thus, the Brief in Opposition is internally inconsistent with respondents' present contention that this case involves nothing but "an exclusive distributorship agreement." *Id.*

Respondents' counterstatement of the case essentially seeks to reargue their position that Whirlpool had its own reasons for terminating Oreck, and Sears had no interest in that decision. This was indeed the defense below, which was clearly and properly rejected by the jury on the evidence (see Petition 5-9, 18-19).

and there was, of course, neither claim nor evidence that Sears' "insistence" could possibly have been related to a non-existent exclusive dealership agreement. The question presented thus becomes whether this Court's *per se* rule against group boycotts applies to a termination agreement obtained by a large purchaser "where such agreement is not ancillary to an exclusive distributorship or to any other valid marketing goal suggested by this Court as possible justification for vertical restrictions" (Petition, 2).

In our Petition, we discussed decisions of this Court and of the Federal Trade Commission, as well as other authorities, establishing that the *per se* rule against group boycott is not limited to horizontal arrangements, and that the salient question is not whether a concerted refusal to deal is horizontal or vertical but whether it can be justified as reasonably ancillary to a lawful transaction or relationship (Petition, 12-14). The Brief in Opposition has failed to meet our contentions based on these authorities.

Respondents' reliance on *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) is not only misplaced, but highlights the need for plenary consideration by this Court (Br. in Opp. 8). As we pointed out in the Petition (14-15), *Continental T.V.*, held that vertical restrictions that reduce intrabrand competition may "promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products." 433 U.S. at 54. Because of these possible "redeeming virtues" (*id.* at 54, 58), this Court held that non-price vertical restrictions should be judged under the rule of reason. It is plain from a reading of the decision that this Court was dealing with restrictions designed to serve a legitimate (and

potentially pro-competitive) purpose in aid of a manufacturer's distribution system and not with naked boycott agreements, made at the "insistence" of large buyers, whose sole purpose and effect is the elimination of competition. The fact that the majority below has misread *Continental T.V.* as bringing such boycott agreements under the rule of reason is, in itself, sufficient reason for granting the Petition.[2]

Respondents also argue that *Tysons Corner Regional Shopping Center*, 85 F.T.C. 970 (1975) is not inconsistent with the decision below and the exclusive dealership cases on which it relies (Br. in Opp. 10, n.4). It is significant, however, that in *Tysons Corner*, the respondent, like respondents here, attempted to escape liability by equating a vertical exclusionary agreement with an exclusive dealership agreement. The Commission was not deceived, pointing out: ". . . [A]n agreement to create an exclusive dealership, though it unavoidably results in an exclusionary result, may nonetheless have redeeming competitive virtues. The same recognition has not been accorded to agreements which have as their main purpose and effect the random exclusion of partial competitors, pursuant to no articulated standards." (85 F.T.C. 1011, n.11). Thus, the Commission drew a sharp distinction between those restrictive agreements that have "redeeming competitive virtues" and naked restraints of trade whose only purpose or effect is the exclusion of competitors. Contrary to respondents' glib attempt to distinguish *Tysons Corner*, it irreconcilably conflicts with the decision below.

[2] As pointed out in the Petition, the anti-competitive consequences of the court of appeals' misreading of *Continental T.V.* are exacerbated by its further holding that the rule of reason would require a demonstration of "anti-competitive effect in the industry as a whole"—a showing that would become increasingly difficult as the victim becomes smaller. Petition, 20-21.

In an apparent effort to deal with the cogent dichotomy developed by Professor Bork between "naked" and "ancillary" boycotts, respondents contend that the agreement between Whirlpool and Sears "even if it existed, . . . *did not eliminate any competition* and hence was not a restraint at all, neither a naked nor an ancillary one" (Br. in Opp. 11, n.5, emphasis in original). This is incomprehensible. Oreck clearly competed with Sears in the sale of vacuum cleaners. In particular, it competed in the mail order segment of the market, and its sales had risen sharply from 8,384 units in 1967 to more than 78,000 units in 1971 (Petition, 4). At a value of just under $50 per unit this represented 1971 sales of nearly $4 million. This growing interbrand competition was eliminated because Whirlpool, at the "insistence" of its largest customer, discontinued selling to Oreck.[3]

Finally, respondents chide petitioner for allegedly arguing that the court below erred because "pro-competitive justification was not shown . . ." (Br. in Opp. 11). We, of course, made no such argument; rather, we showed that this Court in *Continental T.V.* reinstated the rule of reason for those vertical restrictions which, while limiting intrabrand competition, offered potential countervailing benefits to interbrand competition

[3] The fact that Oreck, after being cut off pursuant to the Whirlpool-Sears boycott agreement, was able to sell vacuum cleaners obtained from another source under the "Oreck" name (Br. in Opp. 4), is a tribute to Oreck's competitive vitality and its ability to adjust to adversity. There is no reason to assume that Oreck could not have competed in the mail order market with both the Whirlpool and Oreck units.

(Petition, 15-16). We are, of course, in no way conceding that pro-competitive justification could have exonerated the Sears-Whirlpool boycott agreement. To the contrary, it is our position that that agreement is a naked restraint of trade for which competitive benefit was not even claimed, and which is illegal *per se* under this Court's group boycott cases. Contrary to the decision below, the Sears-Whirlpool boycott agreement is simply not the type of vertical restriction to which *Continental T.V.* extended the rule of reason.

The Brief in Opposition, we submit, emphasizes the need for review, and the implications of the error in the holding of the court of appeals that a naked boycott agreement, if vertical, must be tested under the rule of reason and will be upheld unless anticompetitive effect in the industry as a whole can be shown. This Court should grant the Petition and make it clear that its *Continental T.V.* decision does not compel a rule of reason test for vertical group boycotts and that it did not reinstate the discredited public injury test.[4]

[4] Contrary to respondents' argument, review and reversal as sought by the Petition on Count I, related to the boycott in the U.S. market, is entirely separable from the need for new trial on Count II, related to exclusion from the Canadian market. As we have stated, the judgment on the latter count was reversed because, in reliance on the since-overruled *Schwinn* case, the jury had been instructed to find liability if Oreck had been prevented from selling in Canada, either by a Whirlpool-Sears conspiracy or by Whirlpool alone. See J. A. 927-929; Petition, 5, n.2. Respondents' description of the charge on this point (Br. Opp. 5-6) is erroneous.

Respectfully submitted,

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